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No. 84-879

IN THE

Supreme Court of the United States

October Term, 1984

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., and NORMAN GELLMAN individually and doing business as SOUTHMOST MACHINERY CORP.,

Petitioners,

against

SEVILLE INDUSTRIAL MACHINERY CORP.,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Question Presented

Whether the Court of Appeals' conclusion that respondent Seville's claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq., was pled in a manner consistent with "notice" pleading warrants review by this Court.

Statement of Related Corporations

Seville Industrial Machinery Corp. has no parent, subsidiary, or affiliated corporations.

Table of Authorities

Cases Cited

	Page
Conley v. Gibson, 355 U.S. 41 (1957)	6
Cruz v. Beto, 405 U.S. 319 (1972)	6
Sedima S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482 (2d Cir. 1984)	10
Seville Industrial Machinery v. Southmost Machinery, 742 F.2d 786 (3rd Cir. 1984)	3
United States v. Riccobene, 709 F.2d 214 (3rd Cir. 1983), cert. den. sub. nom., Ciancaglini v. United States, 104 S.Ct. 157 (1983)	8
United States v. Turkette, 452 U.S. 576 (1981)	8
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 1015 (1971)	6

Statutes Cited

18 U.S.C. §1961, et seq. (1982)	1
18 U.S.C. §2314 (1982)	6
18 U.S.C. §2315 (1982)	6

Rules Cited

Fed.R.Civ.P. Rule 9(b)	3

Table of Contents

	Page
Question Presented	i
Table of Authorities	iii
Summary of Argument	1
Argument	2
Conclusion	12

Summary of Argument

This proceeding was initiated by petitioners to overturn the decision of Third Circuit which reinstated respondent's complaint.

The Court of Appeals found that the claim under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 (1982), et seq., as pled, was sufficient to put the defendants on notice of claims against it. Application for rehearing en banc was denied.

Petitioners now seek to have this Court exercise its power of supervision, and review an ordinary issue of "notice" pleading.

Petitioners also seek review of this decision on the grounds that it is in

conflict with prior decisions of this Court and other courts. The conflict claimed by petitioners is that the Third Circuit never decided the scope of RICO, racketeering injury requirements and need for prior convictions. (Petitioner's Brief p.5.) Obviously however, because these issues have not been decided, no conflict exists. Petitioners' contention that it does is simply a red-herring. As will be developed, then, no issue of law for review and no special or important consideration warranting the attention of the Court in this case is presented.

Argument

The Court of Appeals found that respondent's RICO claim was sufficiently

pled to put petitioners on notice of claims against it. Towards that end it concluded that Seville identified and properly alleged the existence of four separate enterprises "marshalled against it." The court reversed "the part of the district court's judgment that held to the contrary." Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 790 (3rd Cir. 1984).

Next, the Court of Appeals considered Seville's pleading of "the circumstances of the fraudulent acts that form the alleged pattern of racketeering activity with the particularity required by Rule 9(b)." Ibid. at 791. It ex-

amined Seville's five "exhibits"* which list over 700 individual pieces of machinery. The court said that Seville satisfied Rule 9(b) "by incorporating into the complaint a list identifying with great specificity the pieces of machinery that were the subject of the alleged fraud." Ibid. at 791. The court went on to find that "the complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresenta-

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* Petitioner for reasons all too obvious has omitted those exhibits from its petition. (Petitioner's Brief pp. vii and 40a.) We have lodged a copy of those exhibits with the Clerk of the Court.

tion.* In sum, we conclude that Seville has alleged the fraud-based offenses with sufficient particularity to withstand a motion to dismiss under Rule 9(b)." Ibid. at 791 and n.6.

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* For example, ¶11B describes one of the alleged acts of fraud:

> [Defendants] [r]epresented to Seville that if the industrial machinery listed in Exhibits A and C were shipped on consignment to either Southmost, Tri-State, Gellman or Alfieri, that the industrial machinery would be resold, and that the purchase price paid by Seville for this equipment along with a 50% pro rata share of the profits resulting from resale would be distributed and paid back to Seville.

App. at 5-6.

Finally, the court found that Seville's allegations that petitioners transported by interstate transportation and sold goods fraudulently obtained worth more than $5,000 also sufficient for pleading purposes. The court held that "Seville has properly pleaded that defendants' conduct violated 18 U.S.C. §§2314 and 2315 (1982)" Ibid. at 792. (Footnote omitted).

In reaching these conclusions the Court of Appeals applied well-settled pleading standards established by this Court in Conley v. Gibson, 355 U.S. 41 (1957) and other cases. See, e.g., Cruz v. Beto, 405 U.S. 319 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 1015 (1971) (federal pleading

policies promote disposition of cases on their merits). It did not however make any new law in this area.

Accordingly, it would be but an ordinary and mundane exercise for this Court to review Seville's complaint to assure that it is consistent with prior pleading law. That is not the sort of important consideration warranting this Court's attention. This fact alone warrants denial of the petition and other factors exist.

The Court of Appeals never addressed, let alone decided, any important RICO issues which may now be pending in this Court and other courts. Specifically, it did not address the scope of RICO, racketeering injury requirements

and need for prior convictions. In fact, the only reference by the court to important RICO decisions was in the context of correctly distinguishing pleadings requirements from proof requirements. Ibid. at 789-90, citing United States v. Turkette, 452 U.S. 576 (1981); United States v. Riccobene, 709 F.2d 214 (3rd Cir. 1983), cert. den. sub. nom. Ciancaglini v. United States, 104 S.Ct. 157 (1983). Petitioners also acknowledge this difference. They said "Admittedly, the Turkette and Riccobene courts were in the procedural posture of reviewing criminal RICO convictions, not determining the adequacy of civil pleadings." (Petitioners' Brief p.7.)

Further, on the only substantive RICO issue even mentioned by the Third

Circuit, i.e., "whether a defendant may also be an enterprise," the court expressly declined to rule on that point. It said "we need not decide this question here." Ibid. at 790.

Despite the total absence of any important RICO finding, petitioners state that the decision of Third Circuit conflicts with decisions of this Court and other courts. In short, they interpret no findings on these issues as tantamount to conflicting findings with those of other courts. Petitioner's strained attempt to demonstrate a conflict therefore obviously fails. It is simply a red-herring and illusionary. What they are really attempting to do, all too conspicuously, is bootstrap themselves into

this Court on the heels of Sedima S.P. R.L. v. Imrex Co., Inc., 741 F.2d 482 (2d Cir. 1984) and other cases. This is improper and not a basis for granting certiorari.

Yet still another reason exists for denying the petition. This case is still in the fetal stage of development. It has not progressed beyond the complaint. No answer has been served. Discovery has not been conducted. No factual record exists beyond the allegations in respondent's complaint. It could well turn out that, after discovery, respondent will be able to prove all elements of RICO, whether statutorily mandated or judicially created including prior criminal convictions. Therefore, this case

is not sufficiently developed for review by this Court.

Conclusion

Petitioner has not shouldered its burden of identifying special or important considerations warranting review on certiorari. Ordinary issues of "notice" pleading do not command the attention of this Court. No conflict exists between the decision of the Court of Appeals in this case and decisions of other courts. Thus, the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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